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In The

# Supreme Court of the United States

NOVOLOG BUCKS COUNTY,

*Petitioner,*

v.

CSX TRANSPORTATION COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Petitioner, Novolog Bucks County's corporate disclosure statement was set forth at page *ii* of its petition for writ of certiorari, and there are no amendments to that statement.

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## REPLY TO BRIEF IN OPPOSITION

Petitioner, Novolog Bucks County ("Novolog"), respectfully files this reply brief in support of its petition for writ of certiorari ("Novolog's petition").

## CSX'S STATEMENT OF MATERIAL FACTS IS INACCURATE

The statement of "material facts" submitted by respondent, CSX Transportation Company ("CSX"), in its brief in opposition ("Br. Opp.") is not inaccurate.

CSX states that "Novolog failed to object to any of the monthly invoices for accrued demurrage charges assessed against it by CSX." Br. Opp. at 5. This is incorrect. Novolog's president and chief executive officer, David Reid ("Reid"), protested CSX's demurrage charges.[1]

[1] *See CSX Transp. Co. v. Novolog Bucks County*, No. 04-CV-4018, 2006 WL 1451280 (E.D. Pa. May 24, 2006) ("May 24, 2006 Mem.") set forth in the Appendix to Novolog's petition ("App.") at App. 37-79. This decision references, *inter alia*, Novolog's evidence of: (1) a September 12, 2003 email from Reid to CSX "stating that Novolog was not the shipper or consignee or freight forwarder of the steel goods in CSX's railcars and explaining Novolog's view of the demurrage charges"; and (2) an April 10, 2003 letter from Reid to J.M. Woodall ("Woodall"), CSX's vice president of metals, "protesting CSX's demurrage charges." *See* App. 46-47.

CSX states:

> For each railcar movement consigned for delivery to Novolog's facility identified in the demurrage bills, Novolog was named as the sole *consignee* on the electronic bill of lading and waybill. For each railcar movement that originated at Novolog's facility identified in the demurrage bills, Novolog was named as the shipper (or consignor) on the electronic waybill because it ordered CSX to provide it with the empty railcars for loading for transportation.

Br. Opp. at 5 (emphasis in original). This is not a statement of fact; it is a summary of CSX's argument. The United States District Court for the Eastern District of Pennsylvania ("district court") declined to make a finding as to whether Novolog was named as the consignee or as the shipper on the relevant bills of lading. *See* May 24, 2006 Mem. at App. 45 n.4 and App. 46 n.6; *see also* opinion from the United States Court of Appeals for the Third Circuit ("Third Circuit"), *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 250 (3d Cir. 2007) ("we cannot determine what the bills of lading showed here") at App. 2.

CSX states that "[t]he applicable tariff is CSXT 8100." Br. Opp. at 5. This is not entirely correct. While CSX argues that its CSXT 8100 tariff ("CSX's Tariff") governs the demurrage dispute between the parties, Novolog contests the application of this tariff to non-CSX customers such as Novolog. *See* Novolog's petition at 5-6 and 23.

CSX states that "Novolog received and was aware of" CSX's Tariff. Br. Opp. at 5. This is misleading. CSX omits the relevant time frame for such statement. Novolog received, and first reviewed, CSX's Tariff when Reid received a copy of the document from CSX as an enclosure to an April 9, 2003 letter from Woodall that advised Reid of CSX's imposition of demurrage charges against Novolog.[2]

Finally, CSX asserts that "[w]ith respect to loaded inbound railcars, Novolog received full railcars, unloaded them as the 'ship to' party or the consignee, and eventually released the empty railcars back to CSX." Br. Opp. at 6. This is not a statement of fact; it is CSX's legal argument. Novolog denies that it unloaded any shipment of freight in the railcars at issue as the consignee.

## ARGUMENT

### I. DECISIONS OF THE THIRD CIRCUIT AND SEVENTH CIRCUIT CONFLICT ON A DEMURRAGE ISSUE OF VITAL IMPORTANCE TO TRANSLOADERS, AND OTHER SIMILARLY SITUATED ENTITIES, AND RAIL CARRIERS

CSX argues that the Third Circuit's decision below is not in conflict with the decisions rendered by

[2] *See* May 24, 2006 Mem. at App. 47 (noting Woodall's April 9, 2003 letter to Reid and the copy of CSX's tariff).

the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") in *Illinois Cent. R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) and *Evans Prods. v. Interstate Commerce Comm'n*, 729 F.2d 1107 (7th Cir. 1984). Br. Opp. at 9-15 and 18. This argument lacks merit, and is based upon CSX's misinterpretation of the case law.

The Third Circuit's decision below is in conflict with the Seventh Circuit on the same important matter, *i.e.*, whether the notification and liability provisions of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10743(a)(1), automatically apply to a transloader or other such entity (*e.g.*, a warehouseman or pier operator) – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – merely because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight.

In *South Tec*, the Seventh Circuit held that the district court erred by holding a warehouse liable for demurrage charges for non-compliance with § 10743(a)(1)'s consignee-agent notification provisions, and instructed the district court to review the record for evidence of whether the warehouse contractually assumed liability for demurrage charges and was the legal consignee for the paper shipments at issue. 337 F.3d at 822. In reaching this decision, the Seventh Circuit ruled that: (1) that § 10743(a)(1)

"applies only to agents who are also consignees, and not to agents who are not consignees"; and (2) mere listing of an entity as the consignee on the relevant bills of lading did not, without more, render that entity the legal consignee under § 10743. *South Tec*, 337 F.2d at 817, 821.

Despite these clear rulings by the Seventh Circuit, CSX argues that there is no real conflict between the decisions of the Seventh Circuit and Third Circuit regarding their respective application of § 10743. CSX, analyzing the import of the *South Tec* decision, asserts:

> Notably, the Seventh Court [sic] stated that, "*in order for us to uphold the application of [section 10743(a)(1)]*, the district court . . . must have found South Tec to be the consignee of the disputed shipments." *Id.* (emphasis added). The clear, unambiguous implication of that statement is that, had there been a finding by the district court that the defendant was the consignee named on the bills of lading, the Seventh Circuit would have applied section 10743(a)(1) when determining whether the defendant's status as a consignee – agent protected it from demurrage liability.

Br. Opp. at 10.

The Third Circuit's decision below belies CSX's skewed analysis of the *South Tec* holding. The Third Circuit ruled:

> [W]e decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in a similar case that the entity listed as the consignee on the relevant bills of lading was not, *without more*, the legal consignee under Section 10743. *See South Tec*, 337 F.3d at 821. *See also Union Pacific Railroad Co. v. Carry Transit*, No. 3:04-CV-1095-B (N.D. Tex. Oct. 27, 2005) (following *South Tec*).

*Novolog Bucks County*, 502 F.3d at 259 (emphasis added), App. 25. Consequently, the Third Circuit held – in conflict with the Seventh Circuit – that "a transloader or other such entity, if named on the bill of lading as the sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery [pursuant to the provisions of § 10743(a)(1)]." *Id.* at 250 (emphasis added), App. 2.

CSX also erroneously argues that since Novolog was designated as the consignee on all the purported waybills and bills of lading in this case, while the defendant in *South Tec* was only designated as the consignee on some bills of lading, there is no true conflict between the rulings in the two cases. Br. Opp. at 11-15. CSX's emphasis on the number of times an entity has been designated as the consignee is

misplaced, and does not provide a basis for this Court to decline to resolve the important questions presented in Novolog's petition.

The operative ruling in *South Tec*, and the cases the *South Tec* court cites with approval (*i.e.*, *Evans Prods.*, 729 F.2d 1107; *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880 (N.D. Fla. 1995); and *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974)), is that the unilateral designation of an entity as consignee on a bill of lading is not sufficient to make the entity a legal consignee for purposes of imposing demurrage liability with respect to that bill of lading. *See South Tec*, 337 F.3d at 821. It is the *unilateral designation* of the term "consignee" – not the number of times an entity was so-designated – which is the focus of these decisions. *See, e.g.*, *Evans Prods.*, 729 F.2d at 1113 ("No liability exists merely on account of being named in the bill of lading or handling the property") (citations omitted); *City of Pensacola*, 936 F. Supp. at 884 ("[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage") (citing *Matson*, 383 F. Supp. at 157; and *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 110 S.W. 1014, 1016 (Tex. Civ. App. 1908)); and *Matson*, 383 F. Supp. at 157.

For example, the court's holding in *Matson* did not turn on the fact that the defendant was not named as the consignee on the majority of the bills of lading as CSX suggests. The decision turned on the

fact that there was no evidence in the record that Matson authorized the shippers to consign goods to it. *Id.* Moreover, with respect to the shipments for which Matson was not listed as the consignee on the bills of lading, the court easily found that Matson could not be held liable for demurrage under the general principle that demurrage fees cannot be charged to non-parties to the transportation contract. *Id.* at 156-57. The court next addressed those instances where Matson was named as the consignee on the carrier's bills of lading and specifically noted that "the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee." *Id.* at 157. The court distinguished Matson's position from situations "where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo." *Id.* The court refused to countenance a result that, under the facts of the case, would place Matson's liability totally within the shipper's control. *Id.*

CSX further attempts to distract this Court from the operative holding in *South Tec*, by arguing that in *South Tec* the rail carrier "understood" the defendant was not the consignee and was acting in an agency capacity, but in this case CSX supposedly had "no reason to know" of Novolog's non-consignee status. Br. Opp. at 14. This argument should be disregarded for several reasons.

First, the Seventh Circuit merely hinted in dicta in *South Tec* that the rail carrier had notice that the defendant-warehouse was not a consignee, and that this fact *may* be relevant "[t]o the extent that some form of notice may play a role in the determination of consignee status[.]" *South Tec*, 337 F.3d at 821.

Second, CSX does not refer this Court to any authority which holds that such notice is dispositive of the consignee inquiry, or point to any case where a carrier's lack of notice was sufficient to make an agent a legal consignee. In fact, courts have rejected such an argument. *See, e.g., Carry Transit, Inc.*, No. 3:04-CV-1095-B at App. 113-114 (carrier's argument that it had no notice that defendant was not properly named as consignee because all it "had to go by were the bills of lading provided to them by the shippers, which listed [the defendant] as the consignee[,]" did not justify imposition of demurrage charges against defendant that did not prepare the waybills or the bills of lading); *City of New Orleans v. Rapid Truck Leasing, Inc.*, 348 So.2d 1299, 1300-01 (La. App. 1977) (where defendant did not prepare either the waybill or bill of lading, plaintiff was not entitled to collect demurrage from defendant on the theory that the waybill upon which plaintiff relied reflected that defendant was the shipper).

Third, the record reflects that Novolog had no reason to know that CSX's shipper-customers incorrectly designated it as the consignee, as opposed to the "care of" party, on the purported waybills and bills of lading in this case. It is undisputed that

Novolog had no part in the preparation of the waybills or bills of lading. CSX also does not contest the fact that it did not present any evidence in the district court proceeding that the bills of lading at issue were ever forwarded to Novolog upon their issuance or at any time, including any time prior to delivery of the freight to Novolog's facility.

Finally, CSX produced documents during discovery establishing its receipt of notice of particular consignee and final destinations designations for loads of freight in the railcars at issue. These documents identify the final destinations and identities of the actual consignees and shipper/consignors at issue – none of which were Novolog. *See* Novolog's petition at 10 and 23-24. CSX does not challenge these facts. Instead, CSX incredibly argues that it has "no reason to know or care about the 'final destination' of freight. . . ." Br. Opp. at 24.[3]

Accordingly, this Court should grant Novolog's petition and resolve the conflict between the Seventh Circuit and the Third Circuit concerning the application of § 10743(a)(1).

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[3] *See also* Novolog's statement of undisputed facts, ¶¶ 23 and 24 (not contested by CSX) at App. 131 (discussing Novolog's status as a port and service contractor).

## II. THE THIRD CIRCUIT'S REFUSAL TO FOLLOW THE SEVENTH CIRCUIT'S DEMURRAGE DECISIONS IS NOT CONSISTENT WITH AND SUPPORTIVE OF THE LEGISLATIVE INTENT WITH RESPECT TO NATIONAL TRANSPORTATION POLICY

While the legislative intent in enacting 49 U.S.C. § 10746 might have been to ensure "the smooth functioning of the rail freight system by creating disincentives against delays[,]" as discussed by the Third Circuit,[4] the Third Circuit's interpretation and application of § 10743(a)(1) below (in conflict with the Seventh's Circuit's interpretation and application thereof), is not consistent with and supportive of such policy.

Initially, Novolog asserts there is a conflict between the Third Circuit and the Seventh Circuit as to whether the provisions of § 10743(a)(1) should be construed to include demurrage charges, as opposed to "payment of rates for transportation for a shipment of property" as the statute specifically provides. CSX disagrees with this position. *Compare* Novolog's petition at 25-27 *with* Br. Opp. at 15-17. Contrary to CSX's arguments, this Court should resolve the issue as to whether the provisions of § 10743(a)(1) pertain to the imposition of demurrage charges.

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[4] *See Novolog Bucks County*, 502 F.3d at 259, App. at 23.

In any event, contrary to CSX's argument that the Third Circuit's decision is "consistent with" and "supportive of" a purported national transportation policy to create disincentives against delays in the rail freight system (Br. Opp. at 19-21), such a policy is *not served* by penalizing transloaders in Novolog's position, and other similarly situated entities, by assessing them with demurrage charges simply because a shipper erroneously designates them as the consignee instead of the "care of" party on a bill of lading. Novolog had no knowledge that the shippers incorrectly designated it as the consignee as opposed to the "care of" party on the purported bills of lading, or that the steel was inbound to its facility before it arrived. Thus, Novolog was unable to provide CSX with notice of its "care of" status along with "the name and address of the beneficial owner of the property if it [was] reconsigned or diverted to a place other than the place specified in the original bill of lading" *before the delivery of the freight to its facility* as required by the Third Circuit's application of § 10743(a)(1).

The Third Circuit's § 10743(a)(1) analysis – in contrast with the Seventh Circuit's – compels a "no-win" situation for Novolog, and similarly situated entities, because it places their liability for demurrage charges exclusively within the control of other parties. Such an inequitable result is obviously not what Congress intended when it enacted § 10746 or § 10743(a)(1).

## CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit below.

Respectfully submitted,

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